IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MICHAEL SAFFORD, Appellant.	)))))))))))	No. 64143-3-I DIVISION ONE UNPUBLISHED OPINION FILED: August 23, 2010

Schindler, J. — Michael Safford appeals his conviction for possession of cocaine with intent to deliver in violation of the Uniform Controlled Substances Act, RCW 69.50.401. Safford claims the trial court erred in denying his motion to suppress the cocaine found during a strip search. Safford asserts the search violated his constitutional right to privacy and the statutory requirements that allow a warrantless strip search under RCW 10.79.130. For the first time on appeal, Safford also claims that the police did not properly obtain approval for the search under RCW 10.79.140. In the alternative, Safford argues his trial counsel provided ineffective assistance by failing to make this argument. We affirm.

FACTS

The facts are undisputed. At approximately 9:30 p.m., on the evening of November 29, 2008, the Seattle Police Department Anti-Crime team was conducting narcotics surveillance in a neighborhood with significant drug activity.

Using binoculars, Officer Daina Boggs saw two men, Safford and Dion Duggins, on the corner of Third Avenue and Bell Street talking briefly to people as they walked by.

Officer Boggs watched as Safford spoke with an older man who handed Safford something and Safford then handed him something in return. The older man took the object Safford handed him, and immediately placed it in his mouth. Based on her training and experience, Officer Boggs "recognized this to be a hand to hand narcotics transaction." After the exchange, Safford briefly talked on his cell phone, then flagged down a white pickup truck, got into the truck, and drove off.

While Safford was gone, Officer Boggs saw Duggins open the palm of his left hand, "sweep something around with his right index finger," and place something in his mouth.

Safford returned a few minutes later and walked up to a group of three or four individuals including Duggins. Safford was holding something small in front of him and unfolded the item in his hand. Officer Boggs stated that based on her training and experience, "it appeared that it was possibly rocks of crack cocaine inside the plastic." After Safford unfolded the wrapping, Officer Boggs watched

him take small pieces from the unfolded item and hand it to a person and take something in return two different times. Officer Boggs told the arrest team there was probable cause to arrest Duggins and Safford for drug-traffic loitering.[1] In a search of Duggins incident to arrest, the police recovered crack cocaine hidden in his mouth.

In a search of Safford incident to arrest, the police did not find drugs. But in a strip search at the police station, officers recovered 7.9 grams of crack cocaine from his butt cheeks.

The State filed an information charging Safford with possession of cocaine with intent to deliver in violation of the Uniform Controlled Substances Act, RCW 69.50.401. Safford filed a motion to suppress the cocaine asserting the warrantless search was unreasonable. The parties stipulated to the facts as set forth in the certification for determination of probable cause and the State and defense trial briefs for purposes of the CrR 3.6 suppression hearing.[2]

At the CrR 3.6 hearing, Safford argued that the officers lacked probable

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[1] The Seattle Municipal Code (SMC) defines the crime of drug-traffic loitering, in pertinent part, as follows:

> B. A person is guilty of drug-traffic loitering if he or she remains in a public place and intentionally solicits, induces, entices, or procures another to engage in unlawful conduct contrary to Chapter 69.50 [. . .] Revised Code of Washington.
>
> [. . .]
>
> D. No person may be arrested for drug-traffic loitering unless probable cause exists to believe that he or she has remained in a public place and has intentionally solicited, induced, enticed or procured another to engage in unlawful conduct contrary to Chapter 69.50 [. . .] Revised Code of Washington.

SMC 12A.20.050 (B), (D).

[2] Unchallenged facts are verities on appeal. State v. O'Neill, 148 Wn.2d 564, 571, 62 P.3d 489 (2003); State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994).

cause to arrest for drug-traffic loitering because Officer Boggs did not see what Safford exchanged with the other individuals, and the police did not find any drugs or drug paraphernalia on him when he was arrested. Citing State v. Audley, 77 Wn. App. 897,907-08, 894 P.2d 1359 (1995), Safford also argued there was no individualized, reasonable suspicion to justify a strip search under RCW 10.79.130(1)(a).

The trial court found there was probable cause to arrest Safford for drug-traffic loitering, and "reason to believe" that he engaged in "passing cocaine." Based on the stipulated facts, the trial court found that, consistent with a drug transaction, Safford stopped at least three individuals, passed items from hand to hand, and that one of the individuals placed the items in his mouth. The trial court found the conduct "highly indicative, specifically indicative, of a drug transaction." The trial court also found that "these observations, in that location and at that time of night, are not consistent with an innocuous transaction," but rather are "consistent with the passing of rocks of cocaine." The trial court also found: "I'm fully aware of the fact that contraband is hidden in many places, including in the crotch area, and between the cheeks."

Coupled with the fact that Safford was going to be placed into a detention facility and because no drugs were found incident to arrest, the court concluded, "the suspicion that [Safford] may have drugs on his person is a reasonable one." The trial court ruled the cocaine discovered during the strip search was admissible, and denied Safford's motion to suppress.[3]

[3] The State filed the trial court's written findings of fact and conclusions of law after

Safford agreed to a bench trial on stipulated facts, that included the police reports and the laboratory test. As part of the police report, a "Felony Arrest Narrative Strip Search Record," states that Safford was arrested for "Possession of Drug or controlled Substance (RCW 69.41, 69.50, 69.52)," and there was probable cause to conduct a strip search. The Felony Arrest Narrative Strip Search Record states that after Safford "saw Officers, he concealed something on his person" and "[l]ess intrusive means have failed to disclose material(s) or conditions suspected of being on the person of the arrestee."

The trial court found Safford guilty of possession of cocaine with intent to deliver and imposed a Drug Offender Sentencing Alternative of 20 months.

ANALYSIS

1. RCW 10.79.130

Safford asserts the trial court erred in denying his motion to suppress because the police did not have reasonable suspicion to believe that a strip search was necessary to discover drugs.

We will uphold written findings entered after a suppression hearing if they are supported by substantial evidence. State v. Hill, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994). Evidence is substantial if it is sufficient to persuade a fair-minded rational person of the truth of the finding. Hill, 123 Wn.2d at 644. We review a trial court's conclusions of law de novo. State v. Eisfeldt, 163 Wn.2d 628, 634, 185 P.3d 580 (2008); State v. Carneh, 153 Wn.2d 274, 281, 103 P.3d

Safford filed his appeal. Because the findings are consistent with the court's oral ruling, Safford does not claim prejudice. State v. Hillman, 66 Wn. App. 770, 773-74, 832 P.2d 1369 (1992).

743 (2004).

RCW 10.79.130 authorizes a warrantless strip search. RCW 10.79.130(1)(a) authorizes a strip search without a warrant if there is a reasonable suspicion to believe a strip search is necessary to discover drugs concealed on a person in custody that that constitute a threat to the security of the detention or holding facility.

The statute provides, in pertinent part:

> (1) No person to whom this section is made applicable by RCW 10.79.120 may be strip searched without a warrant unless:
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> (a) There is a reasonable suspicion to believe that a strip search is necessary to discover weapons, criminal evidence, contraband, or other thing concealed on the body of the person to be searched, that constitutes a threat to the security of a holding, detention, or local correctional facility[.]
> . . .
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> (2) For the purposes of subsection (1) of this section, a reasonable suspicion is deemed to be present when the person to be searched has been arrested for:
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> (a) A violent offense as defined in RCW 9.94A.030 or any successor statute;
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> (b) An offense involving escape, burglary, or the use of a deadly weapon; or
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> (c) An offense involving possession of a drug or controlled substance under chapter 69.41, 69.50, or 69.52 RCW or any successor statute.[4]

In Audley, we held that RCW 10.79.130(1)(a) was constitutional under the Fourth Amendment and that article 1 section 7 "should be interpreted

[4] Safford does not dispute the statute applied to him. RCW 10.79.120 provides that RCW 10.79.130 applies "to any person in custody at a holding, detention, or local correctional facility, other than a person committed to incarceration by order of a court." Safford does not dispute that cocaine constitutes a threat to the security of a holding or detention facility.

coextensively with the Fourth Amendment in this context." Audley, 77 Wn. App. at 905.

To comply with the Fourth Amendment, a strip search must be based on individualized, reasonable suspicion that the arrestee is concealing contraband. Reasonable suspicion to conduct a strip search "may be based on factors such as the nature of the offense for which a suspect is arrested, and his or her conduct." Audley, 77 Wn. App. at 908; citing Giles v. Ackerman, 746 F.2d 614, 617 (9th Cir. 1984).

Individualized, reasonable suspicion was clearly present in Audley. In Audley, the defendant was arrested for possession of a controlled substance with intent to deliver, and the officer saw him reaching down the front of his pants to retrieve suspected cocaine. The officer also testified that the crotch area was a common place to hide drugs. Audley, 77 Wn. App. at 908, n. 11.

In State v. Harris, 66 Wn. App. 636, 643-44, 833 P.2d 402 (1992), we also found reasonable, individualized suspicion based on an arrestee's conduct. In Harris, the officer observed the arrestee holding his buttocks together tightly during a pat-down and asking to use the bathroom immediately upon arrival at the precinct. Harris, 66 Wn. App. at 643-44.

Here, Safford argues the police lacked individualized, reasonable suspicion to strip search him based on the stipulated facts at the CrR 3.6 hearing because the police did not specifically see him attempt to conceal drugs,. We disagree.

There is no dispute that Officer Boggs observed Safford engaging in conduct consistent with drug transactions. And right before his arrest, Officer Boggs saw Safford with what appeared to be crack cocaine and watched him conduct two separate drug transactions. It is undisputed that Safford "walked to a group of people" and "started unfolding an item in his hands," handing small pieces of suspected cocaine to each individual and taking "something in return." However, according to the stipulated facts, at the suppression hearing, no drugs were found on Safford when he was arrested. In the certificate of probable cause, Officer Boggs stated that based on her training and experience "narcotics users and dealers often conceal their narcotics in their mouth or other parts of their bodies to avoid detection."

The record supports the trial court's finding that Safford concealed the drugs he had in his possession just before he was arrested. The evidence also supports the trial court's finding that individuals hide cocaine in many places, "including the crotch area, and between the cheeks." There is sufficient evidence to persuade a fair-minded rational person that there was individualized, reasonable suspicion to justify a strip search.

2. RCW 10.79.140

For the first time on appeal, Safford claims that the strip search was unlawful because police did not obtain prior approval from a supervisor as required by RCW 10.79.140(2).[5] But because Safford's argument does not implicate a constitutional right, it is not manifest error that can be raised for the

first time on appeal. State v. Kronich, 160 Wn.2d 893, 899, 161 P.3d 982 (2007); State v. Lynn, 67 Wn. App. 339, 344-46, 835 P.2de 251 (1992); RAP 2.5(a)(3).

In the alternative, Safford claims his trial counsel was ineffective for failing to argue the search was conducted without prior approval as required under RCW 10.79.140. To prevail on a claim of ineffective assistance of counsel, Safford must show that counsel's performance fell below an objective standard of reasonableness based on consideration of all the circumstances, and that the deficient performance prejudiced him. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). If he fails to establish either of the two prongs, we need not inquire further. Strickland, 466 U.S. at 697; State v. Foster, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

There is a strong presumption of effective representation, and Safford bears the burden of demonstrating there was no legitimate strategic or tactical rationale for the challenged conduct. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). To demonstrate prejudice, the defendant must establish

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[5] RCW 10.79.140 provides, in pertinent part:

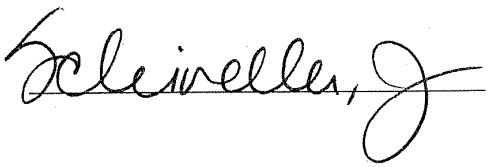
> (1) A person to whom this section is made applicable by RCW 10.79.120 who has not been arrested for an offense within one of the categories specified in RCW 10.79.130(2) may nevertheless be strip searched, but only upon an individualized determination of reasonable suspicion or probable cause as provided in this section.
>
> (2) With the exception of those situations in which reasonable suspicion is deemed to be present under RCW 10.79.130(2), *no strip search may be conducted without the specific prior written approval of the jail unit supervisor on duty*.

(Emphasis added.)

"a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different." Nichols, 161 Wn.2d at 8.

Because the record shows there were legitimate strategic reasons to not raise the issue of compliance with RCW 10.79.140, Safford's claim of ineffective assistance of counsel fails. Safford's strategy in the suppression hearing was to challenge his arrest for misdemeanor drug-traffic loitering under the Seattle Municipal Code based on a limited record. The stipulated facts excluded detrimental evidence. For instance, the Felony Arrest Narrative Strip Search Record shows prior supervisory approval of the strip search under RCW 10.79.140. The strip search record also clearly states that Safford was arrested for felony possession of a drug or controlled substance under RCW 69.41, 69.50, or 69.52.[6] The excluded police reports also show Safford had a "baggie of suspected drugs in his hand" that was not found at the time of the arrest, and that when Safford saw the officers he "concealed something on his person." Because Safford cannot establish deficient performance, his claim of ineffective assistance of counsel fails.

Affirmed.



WE CONCUR:

[6] No prior approval for a strip search is required if the arrest is for an offense involving possession of a drug or controlled substance under chapter 69.50 RCW, such as cocaine. RCW 10.79.130 (2)(c); RCW 10.79.140(2).

Edlington, J. Grosse, J.